

STATE OF VERMONT

SUPERIOR COURT  
Franklin Unit

CIVIL DIVISION  
Docket No. 32-1-19 Frcv

ELMORE-MORRISTOWN UNIFIED UNION  
SCHOOL DISTRICT, STOWE SCHOOL DISTRICT,  
and LAMOILLE SOUTH SUPERVISORY UNION,  
Plaintiffs

v.

VERMONT STATE BOARD OF EDUCATION,  
Defendant

Vermont Superior Court

APR 29 2019

FILED: Franklin Civil

FINAL JUDGMENT

This action came before the court on cross-motions for summary judgment, and the court having granted Defendant's motion as to all Plaintiffs' claims in this matter,

It is hereby ORDERED and ADJUDGED that judgment be, and it hereby is entered in favor of the Defendant on all Plaintiffs' claims in this matter, and

It is further ORDERED and ADJUDGED that Plaintiffs' claims in this matter are hereby dismissed with prejudice.

SO ORDERED this 29<sup>th</sup> day of April, 2019.



Robert A. Mello, Superior Judge

STATE OF VERMONT

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ELMORE-MORRISTOWN UNIFIED  
UNION SCHOOL DISTRICT, STOWE  
SCHOOL DISTRICT, and LAMOILLE  
SOUTH SUPERIVORY UNION,  
Plaintiffs,

v.

VERMONT STATE BOARD OF  
EDUCATION,  
Defendant.

Vermont Superior Court

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FILED: Franklin CBA

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

(Motion Nos. 4 and 5)

The instant dispute is one of several suits arising from the implementation of Act 46 (2015), as amended by Act 49 (2017). This Court has issued several rulings in another Act 46-related suit, and familiarity with those rulings is presumed. See Athens School District v. Vermont State Board of Education, No. 33-1-19 Frcv, Ruling on Plaintiffs' Motion for Preliminary Injunction (Vt. Super. Ct. March 4, 2019) and Ruling on Motions to Dismiss (Vt. Super. Ct. April 12, 2019) (hereinafter referred to as the "Athens Preliminary Injunction Ruling" and the "Athens Ruling on Motions to Dismiss").

In this action brought pursuant to V.R.C.P. 75, the Plaintiffs, Elmore-Morristown Unified Union School District ("EMUU"), Stowe School District, and Lamoille South Supervisory Union (collectively referred to as "EMUU-Stowe") claim that the Vermont State Board of Education (hereinafter the "Board") acted arbitrarily and capriciously in reaching its decision set forth in the Board's Final Order on Statewide School District Merger Decisions Pursuant to Act 46 Sections 8(b) and 10 (dated November 28, 2018) (hereinafter the "Final Report"). In the Final Report, the Board, over Plaintiffs' objections, ordered the merger of EMUU, which had only recently been formed through unification of Elmore and Morristown, and Stowe School District. See Plaintiffs' Cross-Motion for Summary Judgment (filed March 1, 2019) at 8; Plaintiffs' Opposition to Cross-Motion for Summary

Judgment (filed April 1, 2019) at 1. On April 22, 2019, the Court held a hearing on the parties' cross-motions for summary judgment. Upon consideration of the parties' arguments and other submissions, the Board's Motion for Summary Judgment is *granted*, and the Plaintiffs' Cross-Motion for Summary Judgment is *denied*.

## I. Background

### A.

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). The Court may enter summary judgment when, "after adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to [its] case and upon which [it] has the burden of proof." Gallipo v. City of Rutland, 2005 VT 83, ¶ 13, 178 Vt. 244 (citation omitted).

When determining whether there is a disputed issue of material fact, a court must afford the party opposing summary judgment the benefit of all reasonable doubts and inferences. Carr v. Peerless Insurance Co., 168 Vt. 465, 476, 724 A.2d 454 (1998). However, a non-moving party cannot rely on unsupported generalities or speculation to defeat a properly-supported motion for summary judgment. See V.R.C.P. 56 (c), (e). "[C]onclusory allegations without facts to support them are insufficient to survive summary judgment." Robertson v. Mylan Laboratories, Inc., 2004 VT 15, ¶ 48, 176 Vt. 356; accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) ("If the evidence is merely colorable, . . . or is not significantly probative, . . . , summary judgment may be granted.") (citations omitted). Thus, an opposing party's allegations must be supported by affidavits or other documentary materials which show specific facts sufficient to justify submitting its claims to a factfinder. See Robertson, 2004 VT 15, ¶ 15; Samplid Enterprises, Inc. v. First Vermont Bank, 165 Vt. 22, 25, 676 A.2d 774 (1996).

After oral argument and upon review of the parties' submissions, the Court finds the following material facts undisputed.

On June 2, 2015, Vermont enacted Act 46, portions of which were amended in 2017 by enactment of Act 49. See Joint Stipulation of Facts (filed March 1, 2019) at ¶¶ 3,4. In Act 46, the Legislature declared that "[o]n or before July 1, 2019, the State shall provide educational opportunities through sustainable governance structures designed to meet the goals set forth in Sec. 2 [hereinafter "the Goals"] . . ." 2015 Vt. Laws No. 46, § 5(a). New governance structures should be "designed to encourage and support local decisions and actions" that meet the following Goals:

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- (1) provide substantial equity in the quality and variety of educational opportunities statewide;
- (2) lead students to achieve or exceed the State's Education Quality Standards, adopted as rules by the State Board of Education at the direction of the General Assembly;
- (3) maximize operational efficiencies through increased flexibility to manage, share, and transfer resources, with a goal of increasing the district-level ratio of students to full-time equivalent staff;
- (4) promote transparency and accountability; and
- (5) are delivered at a cost that parents, voters, and taxpayers value.

2015 Vt. Laws No. 46, § 2.

Basically, Act 46 created a multi-phase scheme encouraging education-related entities throughout Vermont to undertake voluntary merger. See, e.g., 2015 Vt. Laws No. 46, §§ 6, 7. "The General Assembly defined a legal framework to guide voluntary mergers and other school district governance actions through processes that would ensure that the final constellation of governance structures would possess certain key attributes, either through the 'preferred structure' (a supervisory district) or through the 'alternative structure' (a supervisory union containing more than one school district)." Final Report at 5 (appended to Joint Stipulation at Exhibit S). As outlined infra and as is relevant to the instant dispute, school districts not planning on pursuing voluntary merger by July 1, 2019 are required to evaluate their ability to meet or exceed the Goals established by the Legislature and to present proposals for alternative structures, first to the Secretary of Education for an initial review, and then to the State Board of Education for final rejection or approval. See 2015 Vt. Laws No. 46, § 9.

Accordingly, through Act 46, the Legislature is attempting to move the entire State "toward sustainable models of educational governance" and "to ensure that [small] schools have the opportunity to enjoy the expanded educational opportunities and economies of scale that are available to schools within larger, more flexible governance models." 2015 Vt. Laws No. 46, §§ 2, 3(b). As explained in the Secretary of Education's June 1, 2018 report, in Act 46, "[t]he Legislature determined that the '**preferred structure**' for school districts in Vermont is a UUSD [Unified Union School District] that is large enough to operate as its own SU [Supervisory Union]," thereby "eliminat[ing] both the overarching administrative layer of an SU and its board as well as the SU assessments over which voters have no direct control." See Joint Stipulation at Exhibit H, p. 22; see also 2015 Vt. Laws No. 46, § 5(b). "However, Act 46 recognizes that a preferred, unified system may not be 'possible or the best model' to achieve the Goals in all regions of the State

and, in these situations, an SU with multiple, member districts (an “alternative structure”) ‘can’ meet the Goals, particularly if the SU manifests specific characteristics” outlined in 2015 Vt. Laws No. 46, § 5(c). See July 29, 2016 Guidance: Proposals by One or More Non-Merging Districts for an “Alternative Structure” Under Act 46 (2015), appended to Joint Stipulation at Exhibit D, p. 1.

In its simplest form, an alternative structure under Act 46, §5 (c) may be defined as “an SU composed of multiple member districts, each with its separate school board.” See id. Exhibit D at p. 2. As the July 29, 2016 Guidance further notes, an alternative structure is an exception to the establishment of a preferred, unified system, that is, “a supervisory district with an ADM of at least 900.” Id. at Exhibit D, p. 3; accord 2015 Vt. Laws No. 46 § 8(b).

In relevant part, the July 29, 2016 State Board Guidance related to submission of proposals for alternative structures continues:

***C. Act 46 contemplates that a non-merging district’s or group of districts’ proposal for an “alternative structure” is considered only in connection with the development of the statewide governance plan.***

When preparing the *preliminary* proposed statewide plan for presentation to the State Board, the Secretary’s analysis must include (1) “consideration” of the proposals submitted by a non-merging district or group of districts for an “alternative structure” and (2) “conversations” with those and other districts.

Act 46 requires the State Board to “review and analyze the Secretary’s proposal” under the same standards required for the Secretary’s proposal. The Act authorizes, but does not require, the Board to take testimony or ask for additional information from districts and supervisory unions. The State Board then “publish[es] . . . its order merging and realigning districts and supervisory unions where necessary” either by approving the Secretary’s proposal in its original form *or* in an amended form under the same standards required for the Secretary’s proposal.

Act 46, which created the concept of proposals for “alternative structures,” does not include any other *process* by which a district or group of districts presents a proposal for an “alternative structure” or by which the proposal is reviewed.

***D. Nothing in Vermont law requires the Board to incorporate a non-merging district’s proposal into the final statewide plan. Similarly, nothing requires that an alternative structure included within the final statewide plan is the same as a proposal presented by a non-merging district or group of districts.***

[See subsection “C” above]

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*E. An “alternative structure” is an exception to the creation of a preferred, unified system (a supervisory district with an ADM of at least 900).*

1. A preferred, unified system “may not be possible or the best model to achieve [the Goals] in all regions of the State. In these situations, [an “alternative structure”] can meet the [Goals], particularly if” the SU manifests specific, identified qualities.
  2. The Secretary of Education is required to present to the State Board a proposed statewide education governance plan “that . . . would move districts into a more sustainable, preferred model of governance” to the extent necessary to promote provision of educational opportunities designed to meet the Goals.

*“If it is not possible or practicable”* to merge some districts, where necessary, into the preferred, unified structure *while also adhering to* the protections for tuition-paying and operating districts; or otherwise meeting all aspects of the preferred, unified system”

- a. "then the proposal may also include alternative governance structures as necessary"
  - b. "provided that any proposed alternative governance structure shall be designed" to:
    - i. "insure adherence" to protections for tuition-paying and operating districts; and
    - ii. "promote" the Goals.

3. Act 46 also provides:

3. Act 46 also provides:

The State Board shall approve the creation, expansion, or continuation of a supervisory union only if the Board concludes that this *alternative structure*:

- (1) *is the best means of meeting the [Goals] in a particular region; and*

(2) ensures transparency and accountability for the member districts and the public at large, . . .

*F. When considered globally, points A-E above cumulatively suggest that a proposal by a non-merging district or group of districts for an “alternative proposal” – particularly if the proposal is to maintain the current structure of an existing SU—should be the final option, after all other opportunities for merger and collaboration have been*

*considered and determined not to be possible or the best option for meeting the Goals in the region.*

*G. When considered globally, points A-F above cumulatively suggest that the burden is on the non-merging district(s) to demonstrate due diligence and to provide sufficient, thoughtful evidence in support of a proposal to form an alternative structure.*

*H. A proposal is evaluated not just on its own merits, but also on the impact it may have on neighbors not included in the proposal.*

As the more SU-centric perspective of Phase 1 voluntary mergers ends, the State Board's focus is becoming increasingly expansive—on both the regional and statewide levels. . . .

Joint Stipulation at Exhibit D, pp. 2-5 (footnotes omitted; all emphasis in original).

On August 1, 2016, Vermont's Agency of Education issued "Summary: Unmerged Districts and Alternative Governance Structures," in which it provided further guidance, "not hav[ing] the force of law," regarding districts that do not voluntarily merge in to a preferred structure. See Joint Stipulation at Exhibit C, p. 2. Acknowledging the "need in some regions to create or continue sustainable 'alternative structures,'" the summary notes, in part:

Providing guidance regarding "alternative structures," Act 46 states in Section 5 that:

a supervisory union composed of multiple member districts, each with its separate school board, can meet the State's [education] goals, *particularly if:*

- (1) the member districts consider themselves to be collectively responsible for the education of all prekindergarten through grade 12 students residing in the supervisory union;
- (2) the supervisory union operates in a manner that maximizes efficiencies through economies of scale and the flexible management, transfer, and sharing of nonfinancial resources among the member districts;
- (3) the supervisory union has the smallest number of member school districts practicable, achieved whenever possible by the merger of districts with similar operating and tuitioning patterns; and
- (4) the combined average daily membership of all members districts is not less than 1,100.

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When evaluating an “alternative structure,” the State Board must conclude that the proposal is the *best* means of meeting the goals of quality and equity in the region and ensuring that fiscal transparency and accountability. The State Board must also be mindful that a proposal doesn’t geographically isolate a district that has no other obvious partners, especially if the district has low fiscal capacity or high poverty rates.

Alternative governance structures are a necessary element in the overall Act 46 framework, because Act 46 does not:

- 1) require that all school districts merge into larger governance units;
- 2) establish any required minimum average daily membership (ADM) for all school districts;
- 3) restrict or repeal (or allow restriction or repeal of) the current authority of school districts to continue to pay tuition or to operate a school; or
- 4) change the amount or manner in which a district pays tuition.

Joint Stipulation at Exhibit C, p. 1-2.

On June 26, 2017, the Agency of Education promulgated a set of rules titled “Series 3400—Proposals for Alternative Structures Under Act 46.” See Joint Stipulation at Exhibit E. As this Court has noted, “Rule Series 3400 provides guidance for entities submitting Section 9 proposals in order to assist the Board in meeting its statutorily delegated obligations.” Athens Ruling on Motions to Dismiss at 9. The Series 3400 Rules reflect and incorporate Acts 46, 49, and other relevant provision of Vermont law and “are intended to provide (1) a process by which school districts can propose to be in an Alternative Structure when the proposal does not include voluntary merger and (2) details about some of the supporting information that a district should consider when self-evaluating for purposes of presenting a proposal to merge or a proposal under Act 46, Sec. 9 and that the State Board considers when reviewing merger proposals and will be considering when reviewing proposals under Sec. 9 and creating the Statewide Plan.” Rule 3420 Statement of Purpose (appended to Joint Stipulation at Exhibit E, p.3).

On November 30, 2017, EMUU-Stowe submitted their joint “Proposal for an Alternative Governance Structure.” See Joint Stipulation at Exhibit G. In that submission, the Plaintiffs “propose[d] to continue as side-by-side PreK-12 operating districts assigned to the Lamoille South Supervisory Union.” Id. at Exhibit E, p. 3.

On June 1, 2018, the Secretary of Education released the “Proposed Statewide Plan for School District Governance 2015 Acts and Resolves No. 46, Sec. 10(a).” See Joint Stipulation at Exhibit H. Explaining Act 46’s “Goals and Mandates,” the Secretary’s June 1, 2018 report notes:

As mentioned above, the law identifies the preferred model of school governance in Vermont to be a unified union school district with an average daily membership of at least 900 that provides for the education of its PreK-12 resident students in one of the four most common operating/tuitioning patterns and is large enough to function effectively as its own single-district supervisory union.

The law requires the State Board to “move districts into the more sustainable, preferred model of governance” “to the extent necessary to promote” the Legislature’s stated purpose, except where it “is not possible or practicable” to do so. Some mergers are not “possible” because the law does not permit the State Board to merge districts with unlike operating and tuitioning patters [sic].

The law’s stated purpose for requiring the State Board to create final statewide plan is to “provide educational opportunities through sustainable governance structures designed to meet” the educational and financial goals of Act 46 concerning equity, excellence, and efficiency.

The same legislative mandates and guidance govern development of both this proposal and the State Board’s final statewide plan.

Id. at Exhibit H, p. 15 (footnotes omitted).

Moreover, the Secretary offered a number of “Thematic Observations” concerning Act 46. Of relevance to this dispute is the following:

**Act 46 Disfavors the Continued Existence of Supervisory Unions Where Merger is Possible**

Many of the Section 9 proposals and the subsequent conversations argued *against* joining a larger governance unit based on the premise that the district and its fellow supervisory union members currently collaborate very well and have achieved savings or operational efficiency within the existing supervisory union. The most frequent illustration of this argument was the delivery of special education or transportation services on a supervisory union level, actions required by law since 2012. The fact that some efficiencies have been achieved within a supervisory union does not mean that the current structure is the best way to achieve efficiencies. There are obvious merits in removing this layer of additional structure.

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Furthermore, Act 46 expressly identifies PreK-12 systems of 900 or more students as the preferred structure for meeting the five goals of the Act. There are efficiencies and opportunities available to a unified union school district that are not available to even the most efficiently run supervisory union. Preference for the structure currently in place or “the way we’ve always done things” is not sufficient to outweigh the legal requirements to create larger, more sustainable governance structures where possible and practicable.

Id. at Exhibit H, pp. 18-19. Echoing previously-cited laws and public records, the Secretary explained the “Legal Mandate” as follows:

The Legislature acknowledged that the statewide plan may also include “alternative governance structures *as necessary*, such as a supervisory union with member districts or a unified union school district with a smaller average daily members” “*if* it is not possible or practicable [to merge districts into the preferred structure] in a manner that adheres to . . . the . . . protections for tuition-paying and operating districts” or “that otherwise meets all aspects of” a preferred structure.

The State Board’s final statewide plan may include multi-district SUs “*only if* the Board concludes that this alternative structure . . . is the *best* means of meeting the [Goals] in a particular region; and... ensures transparency and accountability for the member districts and the public at large.

In general, statutes require that the State Board review every type of education governance proposal not only on its own merits, but also on the impact it may have on the students, the districts, the region, and the State.

Id. at Exhibit H, pp. 23-24 (footnotes omitted; all emphasis in original.).

Regarding the Plaintiffs’ Section 9 proposal, the Secretary first noted that the Plaintiffs did not appear to meet the 900 ADM threshold:

In 2015, the voters of Elmore and Morristown voted to create the Elmore-Morristown UUSD (“EMUU”), which provides for the education of its resident students by operating schools for K-12. The Stowe School District is a single-town districts [sic] that also operates all grades. The two districts are the sole members of the Lamoille South SU.

In FY 2018, the Kindergarten ADM of EMUU is 776.51. The Stowe District has a similar ADM of 704.43, for an SU total of 1,480.94. The districts’ joint Section 9 Proposal notes that the county’s population is projected to grow by 3.6%. Agency data reveal that while the Stowe K-12 ADM has increased by 23.4 students from FY 2014 to FY 2018, both Elmore and Morristown have shown decreases in that same period of 4.1 and 30.3 students, respectively.

Elmore's ADM numbers jumped in FY 2015 but have been steadily declining since then, while Morristown's students were relatively stable until a decrease of 25 ADM students occurred from FY 2017 to FY 2018.

Id. at Exhibit H, p. 146.

The Secretary then observed: "Not only is the merger of the EMUU and Stowe Districts 'possible' and 'practicable' in this instance, but the unified district would also be of a size sufficient to support the functions of an SU, thereby creating what the Legislature has determined to be a 'preferred structure'." Id. at Exhibit H, p. 147. Nevertheless, the Secretary's ultimate and contradictory recommendation was that merger was not advisable:

*Accordingly, because the Secretary believes that it is not practicable to require merger at this time because it would not advance the goals of Act 46, the Secretary does not propose that the State Board merge the Elmore-Morristown Unified Union School District and the Stowe School District in the statewide plan. By the time the State Board is required to issue its statewide plan in November, it may have additional information with which to make the final decision.*

Id. at Exhibit H, p. 149 (emphasis in original).

On October 29, 2018, the Board met to consider the Secretary's recommendations. The draft meeting minutes reflect:

Chair Huling began discussion on Elmore-Morristown UUSD and Stowe SD. She read the Secretary's proposed recommendation which states that the Secretary believes that it is not practicable to require merger at this time because it would not advance the goals of Act 46. Perrin said that he has not found a reason to agree with the Secretary's proposal and said they are already in the same SU. O'Keefe, Carroll and Mathis agreed with Perrin. O'Keefe said that this proposed recommendation has received a lot of criticism.

Perrin made a motion: "For the reasons articulated in the Secretary's June 1, 2018 proposed Statewide Education Governance Plan's proposal for the Elmore-Morristown UUSD and Stowe School District, I move that the Board provisionally: (i) find that the proposal satisfies and meets the requirements of Act 46, as amended, our Rules and other applicable law, and (ii) approve the Secretary's proposal for those School Districts, subject to final approval by the Board and after further review and deliberation prior to November 30, 2018." Beck seconded the motion. Discussion followed regarding a missed opportunity by not merging, a lot of time already given and the successful

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Elmore-Morristown merger which allowed Elmore to be a viable school. The motion failed unanimously.

Id. at Exhibit K, pp. 3-4.

On November 12, 2018, the Chairs of both the EMUU and Stowe District jointly submitted a letter asking the Board to reconsider its October 29, 2018 vote. Id. at Exhibit M. In this letter, the Chairs also sought to clarify some misperceptions which they believe surfaced during the Board's October 29 meeting:

#### Average Daily Membership (ADM)

The Secretary's ADM count only included consideration of K-12 students. ADM *by definition* includes all students in a district PK-12. Act 46 clearly speaks to the entire ADM, not a K-12 subsection. Therefore, we would like to state for the record that the correct 2017 ADM for EMUU is **898.85** (of note, this is 1.15 students away from meeting the SU school threshold determined by the state). The correct ADM of Stowe is **761** (bucking the trend, Stowe continues to grow and is projected to meet the 900 threshold within the decade).

#### Time and Impact in EMUU

The VSBE [Vermont State Board of Education] discussion revealed a misunderstanding of the sequence of events that led to EMUU. The unification process began in 2016, after two separate votes (not 2015 as discussed by members of the VSBE). The first organizational meeting occurred on March 22, 2016, and operations began on July 1, 2016. It is also important to note that pieces of the transition process are still underway, including building avenues for school choice to select classes at the Elmore School, phrasing out "grandparented" tuition students, and building community engagement and support for our newly merged district.

Further, this merger was not merely a merger of 19 students, as mentioned in the SBE meeting. This merger impacted a total of 126 Elmore students, and the process of transitioning these students continues.

#### Complaints by Other Districts

At the October 29 meeting, members of the VSBE discussed their concerns that other districts in Vermont complained that Stowe was getting a free pass by not being forced to merge. By all legal standards, that concern is irrelevant. The EMUU/SSD proposal should be reviewed on its own merits and not be compared with other districts' proposals or concerns. Similarly, discussion that focuses on Stowe alone is unduly dismissive of the impact of a

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governance change on the students and communities of Elmore and Morristown, whose student body makes up 62% of our supervisory union.

Id. at Exhibit M, p. 2 (emphasis in original); see id. at Exhibit L (transcript excerpts from October 29, 2018 Board meeting).

When the Board met on November 15, 2018, it once again reviewed the Secretary's recommendation to maintain EMUU-Stowe's current alternative governance structure. See Joint Stipulation at ¶ 17. The Board's Draft Minutes reflect that Plaintiffs' representatives "asked the Board to reconsider and reverse the action taken on October 29 to reject the Secretary of Education's recommendation to approve the EMU[U]-Stowe application for the status quo governance structure." Id. at Exhibit O, p. 10. Their presentation included the offer of additional data and information about current "organization culture" which they believe best meets the Goals of Act 46. Id. When Oliver Olsen asked about current enrollment, Plaintiffs' representative responded: "EMU[U]'s enrollment is 895 ADM students. Stowe is 775. Together we're over – roughly just short of 1700 students." Joint Stipulation at Exhibit P, p. 168.

Commenting on the reason for his provisional vote rejection of the Secretary's recommendation regarding EMUU-Stowe, John Carroll explained:

You asked about why we voted. Speaking only for myself, my vote was based largely upon my reading of the Secretary's assessment and explanation of her recommendation, and I call it rather weak tea when she said something like the Secretary trusts that EMU and Stowe concern for the well being of their children will compel them eventually to blah, blah, blah. Well that's nice to trust and all that. Didn't seem very persuasive. I have to admit that at that time I had not actually sat down and read this 137-page document, but just to show you what a nerd I am, I have.

Id. at Exhibit P, 169-70. After further discussion, a motion for reconsideration of the Board's October 29 provisional vote forcing the merger of EMUU and Stowe failed to pass. Joint Stipulation at ¶ 18 and Exhibit P, p. 226.

On November 28, 2018, the Board met to finalize its provisional decisions and orders. Draft minutes from this meeting reflect the following exchange:

Olsen said that on page 23, he wanted to offer a motion to amend the report with respect to the Elmore-Morristown-Stowe districts Secretary's proposal #26 to affirm the Secretary's original recommendation, rationale and decisions the June 1 proposed statewide plan. Carroll seconded the motion and suggested to add necessary editorial corrections. Huling opened it up for discussion. Mathis asked why this motion was offered. Olsen spoke about feeling like the Morristown and Stowe districts made a compelling case to

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remain distinct districts, have sufficient scale, have demonstrated that they are meeting the goals of the law and that their current structure allows them to meet those goals, of all the feedback received across the state this one was found to be the most compelling, they had a very clear Section 9 proposal, and that Morristown is almost at 900 and at a scale to be an SU, and concern about the capital needs of the districts and these putting them in an adversarial relationship. There was further discussion that if they are working well together that merger makes good sense, that capital needs could be improved upon with a merger, graduation requirements and EQS, and a large amount of support for this decision. Beck weighed in that she found their testimony compelling and that they are meeting the goals of Act 46. Carroll advised to not make the perfect the enemy of the good, but that it is important to recognize the subtleties. Huling spoke about this decision being disconnected from other decisions and that she did not see a clear vision of how the separate structure will help them to meet the goals of Act 46. Olsen spoke to having a greater concern for Elmore and that a shift in structure could shift a financial imbalance. There was more discussion about debt disparity existing in other places and it was suggested that this be given back to the Legislature. O'Keefe asked to call the vote. Chair Huling called a roll vote. . . . The vote was tied at 4:4. Chair Huling broke the vote with a nay. The motion failed.

Id. at Exhibit Q, p. 8.

On November 28, 2018, the Board issued its Final Report. See Joint Stipulation at Exhibit S. To carry out the Legislature's directive that it formulate a final statewide plan, "the Board looked for opportunities to create preferred structures, but where this was not possible (e.g., due to dissimilar operating structures, which cannot be merged under the law) or practicable (e.g., due to a lack of geographic cohesiveness), the Board chose to implement an alternative structure with the attributes specified in the law. . . ." Id. at Exhibit S, p. 8. Upon review, the Board reversed several of the Secretary's recommendations to maintain the status quo and ordered merger, including the merger of EMUU and Stowe. Accepting in part the Secretary's analysis of the Plaintiffs' situation, the Board explained:

The Secretary's Proposed Plan acknowledged that a merger of the EMMUU [sic] and Stowe Districts was both "possible" and "practical" and would result in a unified district that is sufficiently large to be its own supervisory district, the legislatively-designated "preferred structure." Nevertheless, the Proposed Plan concluded that merger is not practicable at this time, citing the "entirely unique situation" presented by the EMUU Board's request for additional time to adjust to the governance arising from its voluntary creation before the EMUU "considers assuming the additional challenge of

further merger." (Proposal at p. 148). The Secretary also noted that there is no other district in the region with which it would be practical for the Stowe School District to merge. . . . The State Board agrees with the Proposed Plan's analysis that the merger of EMUU and Stowe is both possible and practicable, but we disagree with the Plan's conclusion against merger. EMUU is in its third year of operation. At the time of merger, the Elmore School District operated only one school, which provided for the education of approximately 20 students in grades 1-3. The Secretary's conclusion and proposal are not consistent with the proposals the Plan makes in connection with other, similarly-structured districts. Creation of a unified union school district in Elmore, Morristown, and Stowe is in fact practicable because the obstacles and concerns described by the Secretary and by the affected communities are not significant impediments to a merger; merger would achieve the goals of Act 46, as amended. In addition, creation of a unified union school district in this instance leads to its designation as a supervisory district, the Legislature's "preferred structure."

Id. at Exhibit S, p. 24; cf. Defendant's Statement of Undisputed Material Facts (filed March 6, 2019) at ¶ 75 (listing other districts with ADMs above 700 which merged).

## B.

The gravamen of the Plaintiffs' complaint is that the Board acted arbitrarily and capriciously in requiring their merger. See Plaintiffs' Cross-Motion for Summary Judgment (filed March 1, 2019) at 8; Plaintiffs' Opposition to Cross-Motion for Summary Judgment (filed April 1, 2019) at 1. Plaintiffs argue that they submitted an alternative governance structure proposal pursuant to § 9 of Act 46, in which they explained (1) why their current school governance structure is the "best means" for EMUU-Stowe to meet the goals of Act 46, and (2) why merger into a "preferred structure" is neither necessary nor in the best interests of their students. See Amended Complaint at ¶ 4.

While the Secretary of Education agreed with the Plaintiffs, the State Board of Education, after several votes, rejected the Secretary's determination and ordered merger in its Final Report. See Amended Complaint at ¶¶ 5-8. The Plaintiffs assert that the Board relied upon incorrect data and that its Final Order reflects biased decision-making in that it embodies a hostility to alternative governance structures. See, e.g., Plaintiff's Opposition to Cross-Motion at 6.

In a four-count Amended Complaint (filed December 28, 2018), the Plaintiffs set forth the following claims:

Count I: The Board violated State and Federal Procedural Due Process protections by conducting an arbitrary and capricious process. (Amended Complaint at ¶¶ 112-15).

Count II: The Board violated State and Federal Due Process protections by failing to make findings required by Act 46 and Rule 3450 that the mergers are “necessary” or the “best means” of meeting the goals of Act 46. (Amended Complaint at ¶¶ 116-19).

Count III: The Board violated State and Federal Due Process protections, by focusing on whether mergers are “possible” and “practicable,” as opposed to “necessary” or the “best means” of meeting the goals of Act 46. (Amended Complaint at ¶¶ 120-24).

Count IV: The Board’s order violated the separation of powers principle and otherwise constitutes a delegation of legislative powers in violation of Chapter II, Section 5 of the Vermont Constitution. (Amended Complaint at ¶¶ 125-31).

At oral argument, the parties admitted that no issue related to consolidation of debt currently exists for the Court’s review. See Parker v. Town of Milton, 169 Vt. 74, 77, 726 A.2d 477 (1998) (no actual controversy where parties speculating about impact of a grievance). In addition, the Plaintiffs do not raise an Equal Protection claim, nor do they specifically “challenge the General Assembly’s authority to reform school governance structures in Vermont. . . . Rather, Plaintiffs object to the particular processes used by the State Board and the General Assembly to reach the decision to dissolve EMUU and the Stowe School District.” Amended Complaint at ¶¶ 10-11.

In fact, both at oral argument and in its motion, the Plaintiffs admit that merger is both possible and practicable. “Rather, EMUU-Stowe has consistently stated that merger is simply not necessary to meet the goals of Act 46 and in fact is counterproductive to those goals.” Plaintiffs’ Cross-Motion for Summary Judgment at 35. Plaintiffs seek a declaration that the Board violated the Vermont and Federal Constitutions and the issuance of a stay preventing the Board from enforcing its Final Order. See Amended Complaint at 40.

## II. Discussion

### A. Jurisdiction under V.R.C.P. 75

As a threshold matter, the Board argues that Rule 75 does not permit this Court to consider all of Plaintiffs' claims, in particular, their due process claims. See Defendant's Reply in Support of Motion for Summary Judgment (filed April 2, 2019) at 5. V.R.C.P. 75 (a) provides:

Any action or failure or refusal to act by an agency of the state or a political subdivision thereof, including any department, board, commission, or officer, that is not reviewable or appealable under Rule 74 of these rules . . . may be reviewed in accordance with this rule if such review is otherwise available by law.

Where a statute, like Act 46, is silent on the right to appeal, the Vermont Supreme Court has indicated that review under Rule 75 is permitted if comparable to a petition for extraordinary relief, such as certiorari or mandamus. Hunt v. Village of Bristol, 159 Vt. 439, 440-41, 620 A.2d 1266 (1992). For example, the Supreme "Court has held that review of school board decisions under 16 V.S.A. § 1752 may be obtained by a writ of certiorari. ... [and] therefore, [are] properly viewed as a petition to the superior court for review under Rule 75 in the nature of a writ of certiorari." Burroughs v. West Windsor Board of School Directors, 141 Vt. 234, 237, 446 A.2d 377 (1982). The Supreme Court also has suggested that "the proper route for relief by a party aggrieved by [a judicial or quasi-judicial decision of the Board of Education] is to file a petition for certiorari." Campbell v. Manchester Board of School Directors, 152 Vt. 643, 644, 565 A.2d 1318 (1989) (mem.); accord Inman v. Pallito, 2013 VT 94, ¶ 18, 195 Vt. 218 (Certiorari review applies to quasi-judicial actions, not programming decisions.).

Similarly, the Supreme Court has permitted mandamus review "to require a public officer to perform a simple and definite ministerial duty imposed by law." Sylvester v. Pallito, 2011 WL 4984753, \*3 (Vt. March 4, 20110 (unpublished mem.). "[M]andamus ordinarily is not available to compel discretionary decisions. The writ has been extended, however, to reach extreme abuses of discretion involving refusals to act or perform duties imposed by law." Id. (citation omitted.)

Such review is not de novo, but it "is limited to a review of judicial action by inferior courts and tribunals and confined to substantial questions of law affecting the merits of the case." Burroughs, 141 Vt. at 237. "De novo review, whereby the superior court would simply substitute its judgment for that of the [decisionmaker], necessarily usurps power delegated to the executive branch; therefore, that standard is inappropriate unless the statute expressly so provides." Town of Victory v. State, 2004 VT 110, ¶ 16, 177 Vt. 383 (2004). For example, in Garbitelli

v. Town of Brookfield, 2011 VT 122, ¶ 6, 191 Vt. 76, a taxpayer appealed a board of abatement's denial of his request for a tax abatement. The Court noted that

[a] court reviewing governmental action is typically limited to review of questions of law. . . . Review of evidentiary questions is limited to whether there is any competent evidence to justify the adjudication. . . . Applying this standard, review is normally limited to answering legal questions raised by the factual record developed in the administrative proceeding. (citations and quotations omitted).

Likewise, in Turnley v. Town of Vernon, 2013 VT 42, ¶ 11, 194 Vt. 42, a police chief sought review of the town's decision to terminate his employment. The Supreme Court explained:

Under V.R.C.P. 75, a review in superior court by way of appellate review or certiorari is virtually synonymous. . . . This review is confined to questions of law and encompasses the consideration of evidentiary points only insofar as they may be examined to determine whether there is any competent evidence to justify the adjudication, much as in the case of a motion for directed verdict. . . . Discretionary rulings may be set aside only for abuse and the judgment is not reviewable on the merits. . . . Under the deferential standard of review accorded administrative and quasi-judicial bodies in these circumstances, it is not for the superior court to independently weigh the evidence to make its own factual findings. Rather, the superior court on a Rule 75 appeal must uphold factual findings if any credible evidence supports the conclusion by the appropriate standard. (citations and quotation marks omitted).

It is somewhat difficult to discern whether the Board's Final Order is properly subject to certiorari or mandamus review. Here, the Plaintiffs allege, inter alia, that the Board's Final Order requiring their merger is unsupported by evidence and otherwise contrary to the law. They also seek an order requiring the Board to make certain findings which they argue are required by law. As examined infra, Act 46 required the Board to issue a Final Order which reflects resolution of factual disputes and the application of law to particular circumstances. See Fullerton Joint Union High School District v. State Board of Education, 32 Cal.3d 779, 788, 187 Cal.Rptr. 398 (1982) ("quasi-legislative" function reviewable by traditional mandamus), abrogated on other grounds in Board of Supervisors v. Local Agency Formation Commission, 3 Cal.4th 903 (1992). Therefore, consistent with the reasoning of the aforementioned decisions, the Court finds that Rule 75 provides jurisdiction to review the Plaintiffs' claims. See Hunt v. Village of Bristol, 159 Vt. at 440 (review available "[w]hen only questions of law, as opposed to fact, are under consideration. . . ."); Royalton College, Inc. v. State Board of Education,

127 Vt. 436, 451, 251 A.2d 498 (1969) (order of suspension vacated where authority existed in the board but the “factual justification [for its decision] was not demonstrated”).

### B. Count I: Procedural Due Process

Counts I, II, and III present overlapping due process arguments. In Count I, the Plaintiffs allege that the process the Board used when considering its Section 9 proposal violated procedural due process. In particular, the Plaintiffs assert that the “Board failed to articulate the standards it used to evaluate the proposal and instead engaged in ad-hoc decision making, thereby denying EMUU-Stowe due process of law.” Amended Complaint at ¶ 114. In response, the Defendant argues that the Plaintiffs due process claims must fail as a matter of law because: (1) school districts have no legally cognizable liberty or property interest in their continued existence which would give rise to due process protections; (2) Act 46 created a legislative agency process which cannot be challenged on due process theory; and (3) in any case, the Plaintiffs have not identified any procedural deficiencies in the Board’s process. See Defendant’s Reply in Support of Motion for Summary Judgment (filed April 2, 2019) at 2.

This Court has already found that entities such as the Plaintiffs do not have a fundamental right to any particular form of school governance; therefore, their objections to changes in school governance imposed under Act 46 do not implicate the violation of a constitutionally protected right. See Athens Ruling on Motions to Dismiss at 6-7; Athens Preliminary Injunction Ruling at 23. Due process protections do not apply unless the government has deprived an individual of a protected property right. See Luck Brothers, Inc. v. Agency of Transportation, 2014 VT 59, ¶10, 196 Vt. 584; cf. Mason v. Thetford School Board, 142 Vt. 495, 499, 457 A.2d 647 (1983) (Legislature may deny appellate review of State Board’s decision where “there is no constitutional right to be reimbursed by a public school district to attend a school chosen by a parent.”). It does not appear, therefore, that the Plaintiffs have stated the denial of a fundamental right.

Furthermore, “[d]ue process requirements apply to the procedures that must be used in reaching agency determinations only if they are adjudicative, rather than rulemaking or legislative, in nature.” Appeal of Stratton Corp., 157 Vt. 436, 442, 600 A.2d 297 (1991). As this Court recently explained in the Athens case:

To distinguish a legislative decision from an adjudicative one, Vermont courts examine:

- (1) whether the inquiry is of a generalized nature, rather than having “a specific, individualized focus”; (2) whether the inquiry “focuses on

resolving some sort of policy-type question and not merely resolution of factual disputes"; and (3) whether the result is of "prospective applicability and future effect."

Gould v. Town of Monkton, 2016 VT 84, ¶ 21, 202 Vt. 535 (quoting Stratton, 157 Vt. at 443).

Applying these three factors, the Board's Final Order is of a general nature in that it reflects decisions affecting a number of schools and school districts. By its nature and intent, the Final Order focuses on resolving the state-wide policy issues addressed in Acts 46 and 49. Finally, the Board's orders are of prospective applicability and future effect. In short, the Board's Final Order reflects "policy determination, involving general facts, and having a prospective application"; this type of administrative action is "characteristic of legislative function" which is not subject to due process protections. Parker, 169 Vt. at 80.

Even if the Board's actions are viewed as "quasi-judicial" in nature, the process implemented by the Legislature and employed by the Board was not governed by the types of procedures which ordinarily govern decisions in contested cases, such as following rules of civil procedure and subpoenaing witnesses. Cf. In re Professional Nurses Service Application for Certificate of Need, 2006 VT 112, ¶¶ 14-15, 180 Vt. 479. At a basic level, the Board was still implementing legislative directives, and the fact that the Plaintiffs' were provided notice of proceedings and opportunities to be heard in a meaningful time and manner provided them with the process to which they were due. See In Re Miller, 2009 VT 112, ¶ 9, 186 Vt. 505. Act 46, § 10, as amended by 2017 Vt. Laws No. 49, § 8, required the following:

(c) Process. On or after October 1, 2017, the Secretary and State Board shall consider any proposals submitted by districts or groups of districts under Sec. 9 of this act. Districts that submit such a proposal shall have the opportunity to add to or otherwise amend their proposal in connection with the Secretary's consideration of the proposal and conversations with the district or district's under subsection (a) of this section, and in connection with testimony presented to the State Board under subsection (b) of this section. The State Board may, in its discretion, approve an alternative governance proposal at any time on or before November 30, 2018.

The Plaintiffs submitted their Section 9 proposals pursuant to this procedure. Thus, even assuming due process protections are applicable, it is difficult to discern how Plaintiffs were deprived of due process.

Athens Ruling on Motions to Dismiss at 9-10.

Similarly, in this case, due process protections appear inapplicable, but, even assuming the Plaintiffs have raised claims which implicate due process protections, this Court has examined and found constitutionally adequate the procedures the Board used when implementing Acts 46 and 49. See Athens Ruling on Motions to Dismiss at 7 et seq. As recounted supra, the undisputed record shows the Plaintiffs had notice of hearings and also the opportunity to present their positions to decisionmakers. Accordingly, to the extent that the Plaintiffs' claim that the procedures leading to the Final Order violated their right to be heard, their Motion for Summary Judgment is without merit.

Under Count I, as well as under Counts II and III, the Plaintiffs also argue that the Board violated their due process rights by failing to adhere to what they characterize as a "required three-step process" and, as a result, failed to make all findings required by Acts 46 and 49. According to the Plaintiffs,

[i]n order to force school districts to merge, the Secretary of Education. ... first had to provide answers to three questions:

- (1) Was merger "possible"?
- (2) Was merger "practicable"?
- (3) Was merger "necessary"?"

The State Board then had two options. First, it could approve the Secretary's recommendation. ... Alternatively, the State Board could amend the Secretary's recommendation and thereby reach a different result. . . . If it went against the Secretary's recommendations, as it did for EMUU-Stowe, the State Board had to consider the school district's alternative governance structure proposals and independently make the three required findings on possibility, practicability, and necessity.

Plaintiffs' Cross-Motion for Summary Judgment at 1-2.

As further addressed infra, it is true that Act 46 required the Secretary and the Board to consider possibility, practicability, and necessity. However, Act 46 does not assign all these terms the same decisional significance as do the Plaintiffs, nor does it outline that these considerations must be explicitly entertained as part of the procedure described by the Plaintiffs.

To some extent, the idea for the Plaintiffs' aforementioned three-step process appears to arise from the July 11, 2018 Memorandum, wherein the Board Chair

attempted generally to assist groups that had submitted Section 9 proposals. The Chair instructed presenters to be prepared to address the following questions:

- a. Why is the Secretary's proposal not "possible" per Act 46, Section 10?
- b. Why is the Secretary's proposal not "practicable" per Act 46, Section 10?
- c. Why is the proposal you presented the "best" way to meet the Act 46 goals per Act 46, Sections 8(b) and 10?

Provide specific data and references to the requirements of Act 46 to support your contention.

Joint Stipulation at Exhibit I, p. 3. These questions certainly reflect factors which the Legislature intended the Secretary and Board to consider when conducting their analysis under Act 46. However, viewed in context, the questions posed in the July 11 Memorandum were obviously designed to help groups desiring to present further information and arguments regarding the Secretary's recommendations and do not, in and of themselves, establish a mandatory sequence or procedure. In sum, the Court finds the Plaintiffs have not demonstrated that the Board's procedures violated their asserted right to due process.

### C. Counts II and III: Necessity and Best Means

In Counts II and III, the Plaintiffs assert that the Board's finding that their forced merger is necessary and the best means of meeting the Goals is arbitrary and capricious. "Courts generally presume that an agency's action is valid. . . and will defer to the agency's judgment in applying a statute that it is charged to execute." Hunter v. State, 2004 VT 108, ¶ 46, 177 Vt. 339 (citations omitted). When examining agency action, a court must consider the entire provision, not just isolated words and phrases. See In re K.A., 2016 VT 52, ¶ 10, 202 Vt. 86 ("[S]tatutes that relate to the same matter . . . must be read together as a whole. . ."); State v. Chambers, 144 Vt. 234, 239, 477 A.2d 110 (1984) (Court "must examine the entire section, and not just the subsection in question, to determine whether sufficient standards exist.")

As noted, the Plaintiffs admit that the forced EMUU-Stowe merger is both possible and practicable; it does not appear they could credibly argue otherwise. As contemplated in Act 46, a merger into a preferred structure is "possible" when it is legally-possible to do so, and "practicable" when merger would not result unnecessarily in geographic isolation. Instead, Plaintiffs argue that the Board additionally was required to state a finding that merger is necessary because it is the "best means" to meet the Goals of Act 46. Plaintiffs' Cross-Motion for Summary

Judgment (filed March 1, 2019) at 3, 35; Plaintiffs' Statement of Undisputed Facts (filed March 1, 2019) at ¶ 67.

The Plaintiffs' argument is flawed in that it rests upon a misinterpretation of the Legislature's directives and intent. For example, Section 8 of Act 46, titled "Evaluation by the State Board of Education" outlines the following approach:

(a) School districts. When evaluating a proposal to create a union school district pursuant to 16 V.S.A. chapter 11, including a proposal submitted pursuant to the provisions of Secs. 6 or 7 of this act, the State Board of Education shall:

(1) consider whether the proposal is designed to create a sustainable governance structure that can meet the goals set forth in Sec. 2 of this act; and

(2) be mindful of any other district in the region that may become geographically isolated, including the potential isolation of a district with low fiscal capacity or with a high percentage of students from economically deprived backgrounds as identified in 16 V.S.A. § 4010(d).

(A) At the request of the State Board, the Secretary of Education shall work with the potentially isolated district and other districts in the region to move toward a sustainable governance structure that is designed to meet the goals set forth in Sec. 2 of this act.

(B) The State Board is authorized to deny approval to a proposal that would geographically isolate a district that would not be an appropriate member of another sustainable governance structure in the region.

(b) Supervisory unions. The State Board shall approve the creation, expansion, or continuation of a supervisory union only if the Board concludes that this alternative structure:

(1) is the best means of meeting the goals set forth in Sec. 2 of this act in a particular region; and

(2) ensures transparency and accountability for the member districts and the public at large, including transparency and accountability in relation to the supervisory union budget, which may include a process by which the electorate votes directly whether to approve the proposed supervisory union budget.

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Importantly, § 8 must be read in conjunction with the rest of Act 46. Act 46 establishes the presumption that preferred structures best meet all the Goals. It places the burden on an objector to merger into possible and practicable preferred structures to persuade the Board that its alternative structure constitutes a superior means of meeting the statewide and local Goals, which include the establishment of a more consistent statewide governance plan. See 2015 Vt. Laws. No. 46, § 1(e) (“With 13 different types of school district governance structures, elementary and secondary education in Vermont lacks cohesive governance and delivery systems.”). As this Court has observed:

Act 46 does not require the Board to find that the mergers to which they are subject are the only or best means of meeting the Goals set forth in Acts 46 and 49. Properly understood, one overarching objective of Act 46 is to merge school districts; the Legislature already has made the determination that such mergers are necessary to achieve, among its stated Goals, economies of scale and quality education for Vermont’s student population. See, e.g., 2015 Vt. Laws No. 46 §§ 5(c)(2), (3) (suggesting alternative structure mergers “achieved whenever possible”). Again, viewed overall, Acts 46 and 49 reflect the Legislature’s strong preference that individual school districts be merged, when possible, to create “sustainable models of education governance.” 2015 Vt. Laws No. 46, § 2.

Athens Preliminary Injunction Ruling at 17.

Thus, properly understood and applied, § 8(b) offers the Board circumscribed flexibility in circumstances where, for example, there may be a legal or practical impediment to creating a preferred governance structure. Under those circumstances, it permits the Board to consider forming or continuing an alternative governance structure; it may do so if it finds that an alternative structure is the best means of meeting the Goals, and where a preferred structure cannot be formed or is for some reason detrimental to the Goals in Act 46.

Here, then, Act 46 did not, as the Plaintiffs advocate, require the Board to forego establishing a preferred governance structure when such a merger is possible and practicable. In addition, it did not require the Board to address all assertions in their Section 9 proposal for the purpose of weighing whether their current governance structure is “best” as compared to what the Legislature has determined is the “preferred.” In other words, when a merger into a preferred governance structure is possible and practicable, that preferred governance structure, according to the Legislature, is presumptively the best means of meeting the Goals, unless the affected school districts establish otherwise. Where, as here, the Board rejected a proposal to maintain an alternate governance structure, that decision is tantamount to a finding that a preferred governance structure will best meet the

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Goals established by the Legislature. Furthermore, it reflects that the proponents of the status quo did not meet their burden of convincing the Board that it should forego creating a “possible” and “practicable” preferred structure in favor or retaining their current alternative governance structure.

Nor does the imposition of a preferred governance structure here reflect what the Plaintiffs have argued is “political bias” against alternative governance structures; creation of preferred governance structures, where possible and practicable to do so, is exactly what the Legislature directed the Board to do. It is also significant that the Legislature explicitly tasked the Board to make its decisions in consideration of both local and Statewide concerns and effects; therefore, Plaintiffs’ suggestion that mention by Board members of “political concerns” or the possible reception of a decision to maintain the status quo by other communities somehow shows impermissible bias is not well-taken.

The Plaintiffs’ also argue their assumption that discussion and comments by one or more board members evidences either the Board’s failure to read their submissions or a general reliance on incorrect information. See, e.g., Plaintiffs’ Opposition to Cross-Motion for Summary Judgment (filed April 1, 2019) at 8. The Court does not find that the isolated comments which the Plaintiffs highlight support a conclusion that the Board did not read its proposal or otherwise based its decision on materially-erroneous information.

The Plaintiffs’ suggestion that the Board did not base its decision on what it characterizes as completely accurate information is not dispositive. As noted supra, this Court’s review pursuant to Rule 75 is circumscribed. The Court must determine whether the Board’s Final Order is arbitrary and capricious, not whether it would have made the same decision. See Beyers v. Water Resource Board, 2006 VT 65 ¶ 12, 180 Vt. 605 (mem.) (“We review the record to satisfy ourselves that the findings are supported, but we do not reweigh conflicting facts or substitute our judgment for that of the Board.”); Braun v. Board of Dental Examiners, 167 Vt. 110, 114, 702 A.2d 124 (1997) (“Thus, we are concerned with the reasonableness of the Board’s decision, not how we would have decided the case.”); see also Town of Victory, 2004 VT 110, ¶ 16.

The Court is not required to scour the record for agency error; instead, it must determine whether the Board lawfully exercised its statutory discretion and based its decision on facts sufficient to support its determination that merger under Act 46 meets legislatively-outlined goals. See Devers-Scott v. Office of Professional Regulation, 2007 VT 4, ¶ 6, 181 Vt. 248 (“We affirm factual findings of administrative tribunals when they are supported by substantial evidence. . . . Evidence is substantial if, in looking at the whole record, it is relevant and a reasonable person could accept it as adequate.”) (citation and quotation marks

omitted. Because the undisputed record supports the Board's decision, the Court is required to uphold it.

The Board was not required to accept the Secretary's entire report. Here, however, it accepted much of the Secretary's analysis. In addition, when viewed in context, the Plaintiffs' argument that the ADM was improperly computed because it did not include prekindergarten students does not present a material factual dispute.

There is no dispute that the Plaintiffs do not currently meet the preferred ADM of 900 when that figure is properly computed. This is a presumptive statutory minimum for preferred structures. See 2015 Vt. Laws. No. 46, § 5(b)(3). This fact alone is sufficient to support the Board's decision, and this Court's affirmation of that decision.

Moreover, there is no dispute that merger is possible and practicable. There is no dispute that the Plaintiffs, in their current, non-merged governance structures, are already effectively working together. There is no support in Act 46 for the Plaintiffs' notion that locally-perceived difficulty in executing further merger into a preferred structure provides an exemption to the formation of a preferred governance structure. All these undisputed facts further support the Board's Final Order.

As outlined, the record also shows that the Plaintiffs were provided ample opportunity to submit their proposals and data corrections and to argue their position prior to the Final Order. Moreover, comments highlighted by the Plaintiffs show that Mr. Carroll did, in fact, read their proposal before voting on the Final Order. Cf. Lewandowski v. Vermont State Colleges, 142 Vt. 446, 453, 457 A.2d 1384 (1983) ("[W]here the whole tribunal has carefully reviewed the record prior to rendering a decision, grievant was not denied due process of law."). Again, it is undisputed that, as of the date of the Final Order, the Plaintiffs did not meet the ADM of 900; the disputes they raise regarding the accuracy of underlying figures identified throughout this process does not change that ultimate fact, nor do they support a finding that the Board's Final Order is arbitrary and capricious. Plaintiffs' Motion for Summary Judgment on Count I, II and III is denied, and the Defendant's Motion for Summary Judgment on Count I, II and III is granted.

#### D. Count IV: Separation of Powers

In Count IV, the Plaintiffs maintain that the Board's Final Order violates the separation of powers principle and otherwise constitutes a delegation of legislative powers in violation of Chapter II, Section 5 of the Vermont Constitution. As the Plaintiffs acknowledged during oral argument, this Court already has found that

the Legislature's delegation of the implementation of Acts 46 and 49 does not violate Ch. II, § 5 of the Vermont Constitution. See Athens Ruling on Motions to Dismiss at 7; Athens Preliminary Injunction Ruling at 13. As the Court explained in the Athens Ruling on Motions to Dismiss:

When considering the Plaintiffs' Motion for a Preliminary Injunction, the Court found "the delegation under Acts 46 and 49 is constitutional, and that the Legislation, as supplemented by the Board's regulations, supplies sufficient, statute-consistent standards to guide its decisions and to permit this Court's review" of whether the agencies' actions were otherwise arbitrary and capricious. Preliminary Injunction Ruling at 13. Applicable Vermont case law, while sparse, supports this conclusion.

The Vermont Supreme Court has explicitly held that in Vermont, the obligation to provide a public education is a State, not a local, obligation. Brigham v. State, 166 Vt. 246, 256, 692 A.2d 384 (1997). In this case, the State determined that it will meet that obligation by delegating the administration of Acts 46 and 49 to the Vermont Board of Education. See State v. Auclair, 110 Vt. 147, 4 A.2d 107, 114 (1939) ("An agency charged with the duty of administering a statute enacted in pursuance of the police power of the State may be vested with a wide discretion . . ."). The Legislature's delegation of the implementation of Acts 46 and 49, including the modification of existing governance bodies, is properly encompassed in that obligation to provide a public education. See Village of Hardwick v. Town of Wolcott, 98 Vt. 343, 129 A. 159 (1925) (property held by municipalities for public purposes belongs to State).

The Plaintiffs again assert that In re Municipal Charters, 86 Vt. 562, 86 A. 307 (1913) provides relevant precedent for their argument that the delegation under Acts 46 and 49 violates the Vermont Constitution. In re Municipal Charters is an advisory opinion wherein the Vermont Supreme Court opined that an act delegating authority to the Public Service Commission to charter villages violated the powers expressly reserved to the Legislature under Ch. II, § 6 of the Vermont Constitution. 86 Vt. at 562. Because the power to "constitute towns, boroughs, cities, and counties" in § 6 requires the Legislature to exercise its own judgment and "no authority is given to delegate it," the Court advised that the legislature could not delegate village charter creation. However, the Court further observed:

This, however, is not saying that the Legislature can delegate nothing concerning this matter, for there are undoubtedly some things pertaining to it that the Legislature can delegate. But we are not called upon to draw the line between the delegable and the *Vermont Superior Court* *AR 20 230*  
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nondelagable, nor to suggest a way in which the desideratum of a general law for the incorporation of villages can be attained.

Id. Accordingly, to the extent In re Municipal Charters has precedential value, it is inapposite to the present situation and does not foreclose otherwise proper delegation by the Legislature.

An examination of relevant provisions of Ch. II further indicates that Count II of the Amended Complaint is insufficient as a matter of law. Chapter II, § 5 outlines that the “Legislative, Executive and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others.” While the General Assembly cannot delegate its legislative functions, it nevertheless may delegate to administrative agencies, such as the Board of Education, the power to apply general provisions of the law to particular circumstances. See Vincent v. Vermont State Retirement Board, 148 Vt. 531, 535, 536 A.2d 925 (1987). On its face, § 5 does not embody a broad prohibition on the Legislature from making a proper and lawful delegation of powers. See, e.g., Stowe Citizens for Responsible Government v. State, 169 Vt. 559, 560-61, 730 A.2d 573 (1999) (mem.).

Ch. II, §6 sets forth the limitation on the Legislature’s ability to delegate addressed in In re Municipal Charters. In relevant part, Ch. II, § 6 provides that the Senate and House of Representatives

may prepare bills and enact them into laws, redress grievances, grant charters of incorporation, subject to the provisions of section 69, constitute towns, borroughs [sic], cities and counties; and they shall have all other powers necessary for the Legislature of a free and sovereign State; but they shall have no power to add to, alter, abolish or infringe any part of this Constitution.

Contrary to the Plaintiffs’ assertion, Ch. II, § 6 does not require one to conclude that Acts 46 and 49 are a “whole-cloth delegation” allowing the Board to establish chartered “municipal corporations” in the form of merged school districts. See Plaintiffs’ Reply Memorandum at 14 et seq. As examined in In re Municipal Charters, § 6 is a provision which authorizes the Legislature to “grant charters of incorporation” or otherwise “constitute,” in the sense of establishing, governmental subdivisions such as towns and cities. See, e.g., Merriam Webster Online. Retrieved April 5, 2019, from www. Miriam-webster.com (constitute means to set up or establish). It does not set forth a non-delegable duty, relating to school boards, of the type examined in In re Municipal Charters. This conclusion is further supported

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by Vermont Constitution Ch. II. § 68, which in relevant part more specifically states:

Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town *unless the general assembly permits other provisions for the convenient instruction of youth.* (emphasis added).

Thus, it is explicitly within the Legislature's constitutional authority to pass laws like Acts 46 and 49, and, with sufficient guidance and direction, authorize the Board to implement "other provisions" to provide Vermont students instruction. Accord 16 V.S.A. § 821 (a)(3) ("Each school district shall maintain one or more approved schools . . . unless . . . the General Assembly provides otherwise."); cf. Brigham, 166 Vt. at 264 (Education Clause is silent on means of supporting and funding schools, "which can and should be modified if it no longer fulfills its purpose."); Dresden School District v. Norwich Town School District, 124 Vt. 227, 232, 203 A.2d 598 (1964) ("The power of the Legislature to create necessary agencies to implement and administer governmental functions is unquestioned, so long as constitutional prohibitions are observed. . .").

Finally, the Plaintiffs argue that construing Acts 46 and 49 as permitting the Board to formulate and implement the Default Articles of Agreement will result in an unconstitutional delegation of the General Assembly of its power to legislate. See Plaintiffs' Sur-reply at 19. "Act 49 provides that districts subject to involuntary merger under the Final Report have 90 days to adopt their own articles of agreement; otherwise, those districts are subject to the Board's Default Articles of Agreement."

Preliminary Injunction Ruling at 20. On its face, Act 49, § 8 (d) specifically authorized the Board to formulate Default Articles of Agreement and to implement them, if needed, stating: "The statewide plan required by subsection (b) of this section shall include default Articles of Agreement to be used by all new unified union school districts created under the plan unless and until new or amended articles are approved." Under these circumstances, this authorization is not a delegation of the Legislature's power to pass laws. Rather, Act 49, § 8 permissibly grants authority necessary to implement the Legislature's delineated goal of moving "toward sustainable models of educational governance." 2015 Vt. Laws No. 46, § 2; see Stowe Citizens, 169 Vt. at 560-61 ("Nor is the [delegation] doctrine violated when the Legislature gives municipalities the authority or discretion merely to execute, rather than make, the laws."); Royalton College, Inc. v. State Board of Education, 127 Vt. 436, 449, 251 A.2d 498 (1969) ("The

provision for the adoption of rules and regulations to implement the duties of the board are sufficient indicia that the legislature had in mind that these powers must be reasonably exercised and the demands of procedural due process respected.”).

For the reasons set forth in the Preliminary Injunction Ruling, and as further examined herein, the Court finds the Legislature’s delegation of the implementation of Acts 46 and 49 does not violate the Ch. II, §§ 5, 6 and 68 of the Vermont Constitution.

Athens Ruling on Motions to Dismiss at 4-7.

Accordingly, in this matter, the Plaintiffs’ Motion for Summary Judgment on Count IV is denied, and the Defendant’s Motion for Summary Judgment on Count IV is granted.

### III. Conclusion

The Defendant’s Motion for Summary Judgment is *granted*, and the Plaintiffs’ Cross Motion for Summary Judgment is *denied*.

The Clerk is directed to enter final judgment on all counts in favor of the Defendant.

SO ORDERED this 29<sup>th</sup> day of April, 2019.



Robert A. Mello  
Superior Court Judge

Vermont Superior Court